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INC., LEASE SOURCE, INC. and JAY COHEN  
8

9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 JOSEPH CREAM, JR., AMANDA  
CREAM, CATHY CREAM and  
12 FERNANDO CARILLO,

13 Plaintiffs,

14 v.

15 NORTHERN LEASING SYSTEMS,  
INC., LEASE FINANCE GROUP, LLC,  
16 EVO MERCHANT SERVICES, LLC,  
EVO PAYMENTS INTERNATIONAL,  
17 LLC, ALLEN & ASSOCIATES, LEASE  
SOURCE, INC., LEASE SOURCE-LSI,  
18 LLC, CIT FINANCIAL USA, INC., JAY  
COHEN, M PETER S. COHEN, RON G.  
19 ARRINGTON AND DOES 1-100,

20 Defendants.  
21

Case No. C-15-01208 MEJ

**DEFENDANTS' REPLY RE  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT  
PURSUANT TO FEDERAL RULES  
OF CIVIL PROCEDURE, RULE 12b**

Date: June 25, 2015  
Time: 10:00 a.m.  
Dept: B

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Defendants NORTHERN LEASING SYSTEMS, INC., LEASE FINANCE GROUP, LLC, CIT FINANCIAL USA, INC., LEASE SOURCE, INC. and JAY COHEN (sometimes collectively referred to herein as “Defendants”) submit the following Reply in support of their Motion to Dismiss Plaintiffs JOSEPH CREAM, JR., AMANDA CREAM, CATHY CREAM and FERNANDO CARILLO’s First Amended Complaint (“FAC”) filed in the above-captioned action.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. JUDICIAL NOTICE OF THE LEASES IS APPROPRIATE.**

Plaintiffs JOSEPH CREAM, JR., AMANDA CREAM, CATHY CREAM and FERNANDO CARILLO (sometimes collectively referred to herein as “Plaintiffs”) set forth 15 different leases that are the subject of the FAC. Fourteen of the fifteen leases are identified by Plaintiffs by a lease number. One lease is not identified by a lease number, but that lease and those allegations are not alleged against the moving Defendants. Even though Plaintiffs clearly have the Leases in their possession by the fact they specifically allege the lease numbers, the Plaintiffs conveniently do not attach any of the Leases to the FAC. However, because the Leases attached to the Request for Judicial Notice (“RJN”) can be easily identified by the lease numbers cited in the Plaintiffs’ FAC, there cannot be any reasonable dispute that the Leases attached to the RJN are the Leases identified in the FAC. While Plaintiffs may dispute the enforceability of the Leases, they cannot dispute their existence. Therefore, Defendants respectfully request that the Court take judicial notice of the Leases. If the Court wants the Leases submitted through a Declaration of the Defendants, Defendants request that the Motion be continued to allow Defendants to submit the Leases through appropriate Declarations (although that appears to be an unnecessary waste of judicial resources and time).

As stated by Plaintiff, the Court can consider evidence on a Motion to Dismiss for improper venue and in fact, such is required because the issue of venue and the forum selection clause can only be determined based on the Leases. *See*

1 *Argueta v. Banco Mexicano S.A.* (9<sup>th</sup> Cir. 1996) 87 F.3d 320, 324; *see also Doe 1 v.*  
 2 *AOL LLC* (9<sup>th</sup> Cir. 2009) 552 F.3d 1077, 1081.

3 Furthermore, Plaintiff J. Cream's attempt to claim that the forum selection  
 4 clause is invalid is without merit. First, not all the Leases are with J. Cream, yet  
 5 only his declaration was submitted (to which Defendants object). Second, the FA C  
 6 allegations arise directly out of the Leases, regardless of the theories of liability and  
 7 the causes of action asserted. Third, alleging that the entire contract was entered  
 8 into based on fraud is insufficient to defeat a forum selection clause. *See Seecom*  
 9 *Network Services Corporation v. Colt Telecommunications* (N.D. Cal. 2004) 2004  
 10 WL 1960174 \*4. Therefore, the forum selection clauses should be enforced.

11 **II. Dismissal of the FAC is Appropriate pursuant to Federal Rules of Civil**  
 12 **Procedure, Rule 12(b)(3).**

13 The case of *R.A. Argueta v. Banco Mexicano, S.A.* (9<sup>th</sup> Cir. 1996) 87 F.3d 320,  
 14 324, supports a motion to dismiss based on improper venue as the proper procedural  
 15 mechanism by which a party can enforce a forum selection clause. *See R.A. Argueta*  
 16 *v. Banco Mexicano, S.A.* (9<sup>th</sup> Cir. 1996) 87 F.3d 320, 324. The lower court in  
 17 *Argueta* granted defendant's Motion to Dismiss for improper venue based on the  
 18 forum selection clause and the Ninth Circuit Court affirmed. *R.A. Argueta* still  
 19 appears to be good law and there is no indication that it has been overruled by  
 20 *Atlantic Marine Construction Company, Inc. v. United States District Court for the*  
 21 *Western District of Texas* (2013) 134 S.Ct. 568.

22 However, even if this Court finds that the long standing procedural law in this  
 23 District should be discarded and that the proper motion is one to transfer the case  
 24 pursuant to 28 U.S.C.A. Section 1404(a), then Defendants request that the Court on  
 25 its own motion deem Defendants' Motion to Dismiss to be a Motion to Transfer and  
 26 grant the Motion. A Motion to Transfer pursuant to 28 U.S.C.A. Section 1404(a)  
 27 can be brought at any time. *See Galvin v. McCarthy* (USDC, D. Colo. 2008) 545 F.  
 28 Supp. 2d 1176, 1182. Therefore, to force Defendants to file a new Motion when it

1 is clear that this matter should be moved to the forums identified in the Leases,  
2 would be to waste time, expense and judicial resources that appears to be  
3 unnecessary under the facts and legal authority stated in the moving papers and  
4 herein.

5 The reality is that forum selection clauses are prima facie valid and should not  
6 be set aside unless the party challenging enforcement of such a provision can show  
7 it is unreasonable under the circumstances. *Id.* at 325 [citing to *The Bremen v.*  
8 *Zapata Off-Shore Co.* (1972) 407 U.S. 10]. The factors that the court should  
9 consider were set forth in the moving papers and will not be reiterated here.

10 Each of the Leases have exclusive language as to the forum and should be  
11 strictly enforced. Furthermore, each of the Leases also indicate that the law of New  
12 York (and in one of the leases, the law of Illinois) is to govern the lease. Therefore,  
13 a court in New York will be better adept to interpret and enforce New York law (and  
14 Illinois as to Illinois law).

15 As set forth in the moving papers, each of the Leases involving the moving  
16 Defendants contain exclusive forum selection provisions. With the exception of  
17 Lease 1 which has a forum provision for Illinois, all the other leases have a New  
18 York forum provision. Plaintiffs admit to entering into Leases 1 through 14 by the  
19 allegations in the FAC. Plaintiffs are suing the Defendants regarding matters arising  
20 out of the Leases. The Leases are identified in the FAC by lease number which  
21 match the Leases attached to the RJN filed with the moving papers. An evidentiary  
22 hearing to determine this is unwarranted. The Leases are fairly short and the forum-  
23 selection clauses are clearly delineated. In many instances, the Plaintiffs initialed  
24 each page of the lease, so had every opportunity to review the contents thereof. For  
25 instance, J. CREAM signed 11 of the 14 leases and on 8 of the leases he initialed  
26 each page. C. CREAM signed 2 leases and initialed each page on 1 of the leases.  
27 CARRILLO signed 1 lease and initialed each page. The forum selection clauses  
28 were clear and distinct paragraphs.

1       **III. Enforcement of the Forum Selection Clause is warranted.**

2       Even if this Court considers the Motion to Dismiss as a Motion to Transfer  
 3 and looks to the ruling in *Atlantic Marine*, Defendants are still entitled to have this  
 4 case transferred in accordance with the forum selection clauses. The Plaintiffs bear  
 5 the burden of establishing that the transfer is unwarranted, which they have not  
 6 done. *See Atlantic Marine*, 134 S.Ct. 568, 581. A plaintiff's argument that the  
 7 forum set forth in the contract is not convenient or less convenient to the plaintiff  
 8 and/or its witnesses, is of no merit. "When parties agree to a forum selection clause,  
 9 they waive the right to challenge the preselected forum as inconvenient or less  
 10 convenient for themselves or their witnesses, or for their pursuit of the litigation."  
 11 *Id.* at 582. "Whatever inconvenience [the parties] would suffer by being forced to  
 12 litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the  
 13 time of contracting." *Id.*

14       Even based on *Atlantic Marine*, the Plaintiffs have not set forth sufficient  
 15 facts or legal authority to defeat the Motion and usurp the forum selection clauses.  
 16 Plaintiffs signed the Leases and in many instances initialed each page. The forum  
 17 selection clauses were an integral part of the Leases, were separate paragraphs and  
 18 had Plaintiffs bothered to read the Leases (presuming that they did not as they seem  
 19 to indicate), the forum selection clauses would have been found. The forum  
 20 selection clauses should be deemed valid and enforceable and either this matter  
 21 should be dismissed or transferred to the proper forum pursuant to the Leases.

22       **IV. EVIDENTIARY OBJECTIONS TO DECLARATION OF JOSEPH**  
 23       **CREAM, JR.**

24       Pursuant to Local Rule of Court, Rule 7-3(c), Defendants object to the  
 25 Declaration of Joseph Cream, Jr. ("Cream Dec.") as follows:

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1 Paragraph 1: Objection – Relevance: Cream only identifies himself as owner of  
2 Creams Dismantling, Inc. Therefore, the declaration can only be considered in  
3 relation to the Leases in the name of Creams Dismantling and no other Leases.

4 Paragraph 2: Objection – Relevance, Overbroad: Cream fails to identify the name  
5 of the “salesmen” or on behalf of which Defendant the salesmen were working.  
6 Furthermore, the statement therein is not relevant to the limited issue before this  
7 court of the enforceability of the forum selection clauses.

8 Paragraph 3: Objection – Relevance, Overbroad: Cream fails to identify the name  
9 of the “salesmen” or on behalf of which Defendant the salesmen were working.  
10 Furthermore, the statement therein is not relevant to the limited issue before this  
11 court of the enforceability of the forum selection clauses.

12 Second Paragraph 3: Objection – Relevance, Overbroad: Cream fails to identify the  
13 name of the “salesmen” or on behalf of which Defendant the salesmen were  
14 working. Furthermore, the statement therein is not relevant to the limited issue  
15 before this court of the enforceability of the forum selection clauses.

16 Paragraph 4: Objection – Relevance, Overbroad, Best Evidence: Cream fails to  
17 identify the name of the “salesmen” or on behalf of which Defendant the salesmen  
18 were working. Furthermore, the statement therein is not relevant to the limited issue  
19 before this court of the enforceability of the forum selection clauses. Cream also  
20 fails to attach to the declaration copies of the leases that he claims were sent to him.

21 Paragraph 5: Objection – Relevance, Overbroad: Cream fails to identify the name  
22 of the “salesmen” or on behalf of which Defendant the salesmen were working.  
23 Furthermore, the statement therein is not relevant to the limited issue before this  
24 court of the enforceability of the forum selection clauses.

25 Paragraph 6: Objection – Relevance, Overbroad: Cream fails to identify the name  
26 of the “salesmen” or on behalf of which Defendant the salesmen were working.  
27 Furthermore, the statement therein is not relevant to the limited issue before this  
28 court of the enforceability of the forum selection clauses.

Paragraph 7: Objection – Relevance, Overbroad, Best Evidence: Cream fails to identify the name of the “salesmen” or on behalf of which Defendant the salesmen were working. Furthermore, the statement therein is not relevant to the limited issue before this court of the enforceability of the forum selection clauses. The Leases speak for themselves as to the inclusion of forum-selection clauses and Plaintiffs signed the Leases and in many instances initialed each page. Presumably Plaintiffs read what they were signing.

## V. CONCLUSION

Based on the moving papers and the foregoing, Defendants, and each of them, respectfully request that the Court grant the Motion to Dismiss in its entirety based on improper venue and dismiss the First Amended Complaint as to Defendants NORTHERN LEASING SYSTEMS, INC., LEASE FINANCE GROUP, LLC, CIT FINANCIAL USA, INC., LEASE SOURCE, INC. and JAY COHEN, and each of them. In the alternative, DEFENDANTS, respectfully request that for judicial expediency that the Court order the transfer of the case to the proper forums pursuant to the Leases.

Dated: May 21, 2015

SOLOMON, GRINDLE, SILVERMAN  
& WINTRINGER, APC

By: /s/ Holly J. Nolan  
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